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In the Supreme Court of the United States

OCTOBER TERM, 1957

A. J. KAHN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	1
Statutes involved	2
Statement	3
Argument	4
Conclusion	6

CITATIONS

Cases:

Glasser v. *United States*, 315 U. S. 60	5
United States v. *Socony-Vacuum Oil Co.*, 310 U. S. 150	5

Statutes:

26 U. S. C. 2707 (b)	2
26 U. S. C. 3285	2, 3, 5
26 U. S. C. 3290	2, 3, 5

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was rendered on January 8, 1958. The petition for a writ of certiorari was filed on February 6, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether there was sufficient evidence to support the finding of fact by the district court that petitioner was engaged in the business of accepting wagers.

STATUTES INVOLVED

26 U. S. C. 3285 provides in pertinent part:

> (a) Wagers.
>
> There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.
>
> (b) Definitions.
>
> For the purposes of this chapter—
>
> (1) The term "wager" means (A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers * * *.

26 U. S. C. 3290 provides:

> Tax.
>
> A special tax of $50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable.

26 U. S. C. 2707 (b) provides:

> (b) Any person required under this subchapter to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this subchapter who willfully fails to pay such tax, make such returns, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

STATEMENT

In a five-count information filed in the United States District Court for the Southern District of California petitioner was charged with failure to pay the occupational tax required of those engaged in the business of accepting wagers (26 U. S. C. 3290) and failure to pay the 10% excise tax on wagers (26 U. S. C. 3285) accepted by petitioner in 1953 and 1954 (R. 3–6). A jury trial was waived by petitioner (R. 37) and the court found him guilty of failing to pay the occupational tax (count 1) and failing to pay the excise tax on wagers accepted in September, 1953 (count 2), December, 1953 (count 4) and March, 1954 (count 5).[1] He was sentenced to concurrent terms of one year on each of counts 2, 4 and 5 and fined $10,000 on count 1 with the prison sentence suspended and petitioner placed on probation for three years on condition that the fine be paid on or before December 1, 1956.

The evidence showed that the petitioner, a resident of San Diego, was, at the time of the alleged offenses (1953–1954), engaged in managing five or six restaurants and bars in San Diego (R. 281). One of these was the Club Royal in which petitioner had an office (R. 281–283).

Hubert Ursich, an old friend of petitioner, testified that between July 1, 1953, and March 26, 1954, he placed approximately 30 wagers with petitioner (R. 43, 44–74). He testified that these bets were placed at the Club Royal in an office behind the bar occupied by the petitioner (R. 43). "Just in a matter of con-

[1] He was found not guilty on count 3 which concerned wagers during October, 1953 (R. 4).

versation" Ursich would tell Kahn that he would like to bet on "such and such a horse for so much money" and then he would pay by cash or check (R. 44). Thirty-one checks (Gov't. Exhibits Nos. 1–31), four of which bore petitioner's indorsement, were introduced in evidence and identified (except for No. 27; R. 67) by Ursich as checks given by him to petitioner in payment for bets placed with petitioner (R. 44–67). The total value was over $8,000. This witness also testified that in March, 1954, petitioner told him that he was going to Las Vegas and that he "was leaving Mr. Zimmerman in charge" with whom the witness could place his bets (R. 69, 173). The witness then "bet several bets * * * with Mr. Zimmerman", one of which required Zimmerman to call petitioner in Las Vegas for his approval (R. 71, 176).

Another witness, Eddie Qualin, testified that in September, 1953, at Delmar race track he placed three bets ($300 apiece) with petitioner on the horse races (R. 140–146).

At the close of the evidence offered by the government, and again at the conclusion of petitioner's own case, he moved the court for a judgment of acquittal (R. 187, 312). Both times the motion was denied (R. 193, 313). Petitioner's conviction was upheld by the Court of Appeals (Pet. App. A).

ARGUMENT

1. Petitioner contends that the courts below erred in finding that he was a person engaged in the business of accepting wagers and thus required to pay an oc-

cupational and an excise tax (Pet. 6-13). He contends that the wagers accepted by him were "social" or "friendly" bets not within the purview of sections 3285 and 3290 of the Internal Revenue Code of 1939 (Pet. 6).

The question as to whether petitioner was "engaged in the business of accepting such wagers" was a question of fact to be determined by the trier of fact (the district court here). Its determination, if adequately supported by the record, is conclusive on appeal. See *Glasser* v. *United States*, 315 U. S. 60, 80; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 254. Here the district court's finding that petitioner was engaged in the business of accepting wagers in 1953 and 1954 was adequately supported by substantial evidence in the record. It was shown at the trial that from 1948 petitioner was known to be a person who would book wagers (R. 140). During the seven month period covered by the specifications in the bill of particulars (R. 11-13) petitioner booked at least $9070.00 in bets for the two witnesses alone—an average of approximately $1295.00 per month. And it was also shown that petitioner considered his activity in this respect so important that he named Zimmerman, a professional gambler (R. 173), to accept the bets while he, the petitioner, was away. These various factors together justify the finding that petitioner's bets were more than merely "social" or "friendly". There is no occasion for further review by this Court.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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